

Macy's East and Theatrical Wardrobe Union Local 764, I.A.T.S.E., AFL-CIO, Petitioner. Case 29-RC-8936

October 30, 1998

DECISION ON REVIEW AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On November 14, 1997, the Regional Director for Region 29 issued a Decision and Direction of Election in this proceeding in which he found appropriate the petitioned-for unit of eight wardrobe personnel, including all sewers and stitchers, in the Employer's Special Production Department (costume shop) at its Brooklyn, New York facility. The Regional Director found that the disputed employees are seasonal employees with a reasonable expectation of recall in 1998 and thus are eligible to vote in the election.

Thereafter, in accordance with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Employer filed a timely request for review of the Regional Director's decision, contending, *inter alia*, that the petitioned-for employees are temporary employees and therefore are not eligible to vote. By Order dated December 4, 1997, the Board granted the Employer's request for review solely with respect to this issue. The election was held as scheduled on December 5, 1997, and the ballots were impounded pending the Board's Decision on Review. Thereafter, by Order dated December 16, 1997, the Board denied the Petitioner's Motion for Reconsideration.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this proceeding, including the Employer's brief on review, and finds, in agreement with the Employer, that the disputed employees are temporary employees with no reasonable expectation of future employment and, therefore, that they are ineligible to vote.

The Employer is engaged in the retail sale of clothing and household goods. The Employer has a costume shop in its Brooklyn, New York facility, which operates only for a short period of time each year for the limited purpose of preparing costumes for the Macy's Thanksgiving Day parade, and for cleaning and packing them away after the parade is over. The costume shop employees are employed from August/September to late December/early January. They are the only employees employed to work in the costume shop.

In deciding whether seasonal employees' are eligible voters, the Board assesses their expectation of future employment. Factors which the Board considers in finding employees to be regular seasonal employees include the size of the area labor force, the stability of the employer's labor requirements and the extent to which it is dependent upon seasonal labor, the actual reemployment season-to-season of the worker complement, and the em-

ployer's recall or preference policy regarding seasonal employees. *Maine Apple Growers*, 254 NLRB 501, 502 (1981).¹ Temporary or casual seasonal employees are ineligible.

Applying this test to the instant case, we find, contrary to the Regional Director, that the eight employees at the Employer's costume shop are not seasonal employees with a reasonable expectation of future employment. Rather, we find that they are temporary employees with a finite employment termination date. Although the Employer has a recurrent need to staff its costume shop with employees for a limited time each year, and therefore is dependent upon seasonal labor, the record does not establish that the Employer has a practice of employing the same costume-shop employees from year-to-year, or that any costume shop employee obtains permanent employment with the Employer.² The record contains evidence that at least some employees hired in 1997 were led to believe at their initial interview that there was a possibility that they could be rehired in 1998. Specifically, Kevin Ritter, the costume shop coordinator, testified that he was asked on October 31, 1997, by Laura Lerner, the Employer's production manager and supervisor of the costume shop, whether he was interested in assuming the position for the following year because Jean McFadden, senior vice president for sales promotion and advertising, wished to keep continuity in the department. Ritter responded in the affirmative. Similarly, Lerner told Elizabeth Cassin during the interview that if they liked each other and everything worked out, Cassin could come back next year. Finally, Lerner told Abigail Stowe during her interview that if this year went really well, then she would be welcome to come back in the future.

Notwithstanding this evidence, however, we find that the record as a whole does not establish that the Employer in fact had a policy of recalling or giving preference in future years to former employees. In this regard, the Employer does not keep a list of previously employed costume shop employees for use in future hiring. Instead, each June the Employer places advertisements seeking to fill the costume shop positions. Significantly, the Employer had not previously employed the eight disputed employees hired for the 1997 season. In addition, all three costume shop employee witnesses were told at the interview that their employment would end after the

¹ Compare this approach to the test for determining whether non-seasonal employees are temporary employees. See, e.g., *Personal Products Corp.*, 114 NLRB 959, 960 (1955); *Lloyd A. Fry Roofing Co.*, 121 NLRB 1433 (1958).

² Mark Schonberg, director of operations for annual events for 22 years, testified that he could not recall any instance where costume shop employees were kept on in the employ of the Employer once the clean up period was over. Schonberg also testified that he could not provide a percentage of costume shop employees over a 22-year period that returned to the costume shop for further employment in another year.

clean-up process was over. Further, the Employer's personnel records indicated that each of the eight positions was temporary, and each of the three employee witnesses testified that the Employer issued them a temporary identification card with a finite expiration date, indicating the last day of employment. We note that the record provides no evidence concerning the size of the available labor force from which the Employer draws its costume shop employees.

Based on the above, we conclude that the petitioned-for employees in the Employer's costume shop are tem-

porary employees as the Board defines that term, and that they therefore do not constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. See *Root Dry Goods Co.*, 126 NLRB 953 fn. 10 (1960); *F. W. Woolworth Co.*, 119 NLRB 480, 484 (1957). Accordingly, the Regional Director's decision is reversed.

ORDER

The petition is dismissed.